NO. 97532-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION

Respondent/Cross-Appellant

v.

YAKIMA HMA, LLC, d/b/a YAKIMA REGIONAL MEDICAL AND CARDIAC CENTER

Appellant/Cross-Respondent

BRIEF OF AMICI CURIAE THE WASHINGTON EMPLOYMENT LAWYERS ASSOCATION AND THE WASHINGTON STATE LABOR COUNCIL

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington Employment Lawyers Association (WELA) is an organization of approximately 200 lawyers licensed to practice law in Washington. WELA is a chapter of the National Employment Lawyers Association. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA's members frequently represent employees in cases brought under Washington wage statutes. WELA has appeared in numerous cases before this Court involving employee rights.

The Washington State Labor Council (WSLC) comprises more than 600 local unions and represents approximately 550,000 rank-and-file union members working in Washington State. WSLC is widely considered to be the "voice of labor" in Washington State and has a strong interest in advocating for the interests of Washington State workers. WSLC provides many services to its affiliated unions, including legislative advocacy, political action, and communication through its website "The Stand," supporting affiliated unions' organizing drives by rallying community leaders and elected officials, and providing programs that provide affiliate and direct worker assistance like dislocated worker assistance, increasing student awareness about apprenticeship programs within

community and technical colleges, Project Help, education and training for union members, and assistance for unions with contract and economic research.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

State wage and hour laws "play a crucial role in protecting workers' rights and creating a level playing field for businesses."[1] Nevertheless, "[p]ervasive violation of both federal and state wage and hour laws across the United States is well documented."[2] These violations include off-the-clock, meal break, and overtime violations like the claims in this case.[3]

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[1] Jacob Meyer & Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators*, at 7 (2011), available at https://www.law.columbia.edu/sites/default/files/microsites/career-services/Wage%20and%20Hour%20Report%20FINAL.pdf (last visited September 20, 2019); *see also* David Cooper & Teresa Kroeger, *Employers steal billions from workers' paychecks each year* (May 10, 2017), available at https://www.epi.org/files/pdf/125116.pdf (last visited September 20, 2019) ("when states enact strong penalties against wage theft—particularly 'treble damages' statutes that award victims of wage theft three times the value of their stolen wages—it does have a deterrent effect.").

[2] Meyer & Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators*, at 5 (2011), available at https://www.law.columbia.edu/sites/default/files/microsites/career-services/Wage%20and%20Hour%20Report%20FINAL.pdf (last visited September 20, 2019).

[3] David Cooper & Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, at 4 and 7 (May 10, 2017), available at https://www.epi.org/files/pdf/125116.pdf (last visited September 20, 2019).

For example, a landmark survey published in 2009 revealed that nearly one quarter of employees worked additional hours for their employer "off-the-clock," and 70 percent of those employees were not paid for all the work they performed outside of their regular shift.[4] The same survey found that 69 percent of employees who were legally entitled to a meal break experienced one or more meal break violations in the previous workweek.[5] And 76 percent of employees who worked more than 40 hours in the previous week were not paid the legally required overtime rate by their employers.[6] These workers averaged 11 hours of overtime—hours that were either underpaid or not paid at all.[7]

In an effort to protect the welfare of working people in Washington, the Legislature has enacted a statutory scheme of state laws to ensure minimum standards for working conditions, wages, and the payment of wages. This includes the Minimum Wage Act (MWA), chapter 49.46 RCW, which creates a right to compensation for each individual

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[4] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 3 (2009), *available at* http://www.unprotectedworkers.org/index.php/broken_laws/index (last visited Sept. 24, 2019).

[5] *Id*. at 3.

[6] *Id*. at 2.

[7] *Id*.

hour worked and a right to overtime compensation for hours worked over 40 in a workweek. *See Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 619, 416 P.3d 1205 (2018) (citing RCW 49.46.020(1)); RCW 49.46.130. Washington's scheme of wage and hour protections also includes the Industrial Welfare Act (IWA), chapter 49.12 RCW, which prohibits conditions of labor that fail to meet the minimum requirements for meal breaks. *See* RCW 49.12.170; WAC 296-126-092(1). Both the MWA and IWA are broad in scope and liberally construed to ensure their remedial goals are realized.

This case presents one primary issue regarding the use of representative employee testimony to establish liability for violations of Washington's wage and hour laws and to provide a remedy to individual members who belong to an employee association. In Washington, labor unions have associational standing to seek monetary damages for wage claims on behalf of employee members. The use of representative evidence is fundamental to the vindication of such claims. This is particularly true in cases where the employer fails to keep and maintain records of all hours worked. The trial court's finding that the union could maintain its associational standing and use representative employee testimony is consistent with the third prong of the associational standing

analysis and is also consistent with the policies behind the MWA. Thus, the trial court properly allowed the Washington State Nurses Association to use representative evidence to prove Yakima Regional's liability to the union's members.

For the following reasons, WELA and WSLC respectfully ask this Court to affirm the decision of the trial court.

III. ANALYSIS

A. Allowing the use of representative testimony promotes convenience and efficiency and is therefore consistent with the third prong of the test for associational standing.

In Washington, a labor union has associational standing to pursue wage claims on behalf of its employee members if it satisfies three elements: (1) the members of the organization would have standing to sue in their own right; (2) the interests the organization seeks to protect in the litigation are germane to its purpose; and (3) neither the claim nor the relief requires the participation of the organization's individual members. *Int'l Ass'n of Firefighters Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186 (2002) (hereinafter "*Firefighters*"). The first two elements are rooted in standing requirements imposed by Article III of the United States Constitution. Although this Court has adopted federal requirements to determine whether an association may bring claims on

behalf of its members, the general jurisdiction of Washington's Superior Courts is not limited by federal Article III standing requirements.

The third prong exists to (1) promote "adversarial intensity," (2) ensure that the associational plaintiff does not lack for evidence of the harm alleged, and (3) "hedge against any risk that damages recovered by the association will fail to find their way into the pockets of members on whose behalf injury is claimed." *UFCW Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553, 116 S.Ct. 1529, 134 :.Ed.2d 758 (1996) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). "Hence, the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id*. at 557; *see also Firefighters*, 146 Wn.2d at 213, 215-216 (noting third prong of associational standing test focuses on convenience and efficiency).

Allowing a union to pursue monetary damages on behalf of its members "affords a practical and sensible remedy to individual members who belong to an employee association and, perhaps, lack the means to bring a lawsuit on his or her own behalf," while ensuring that courts are not burdened with multiple lawsuits arising out of the same set of facts.

Firefighters, 146 Wn.2d at 216. Allowing the association to use representative employee testimony to establish liability and damages also furthers these practical objectives.

1. The use of representative evidence in wage and hour class actions is well established and has allowed workers to efficiently obtain relief for widespread employment violations.

The same objectives of convenience and efficiency underlie Washington's class action procedure. This Court recognizes that "[c]lass actions serve an important function in our system of justice." *Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982). Class actions "provide a procedure for vindicating claims which, taken individually are too small to justify individual legal action but which are of significant size and importance if taken as a group." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002). Class actions therefore also "improve access to the courts." *Darling*, 96 Wn.2d at 706. For these reasons, Washington's class action procedure "demonstrates a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007).

In keeping with this policy, both this Court and federal courts have upheld the use of representative evidence to prove class claims brought under Washington's wage and hour laws. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876-77 (2012) (overturning jury instruction that "effectively prohibit[ed] the use of representative evidence in a class action under the MWA"); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 900 (9th Cir. 2003) (concluding that "representative evidence adduced by the plaintiffs adequately and accurately supported a damage award for all plaintiffs" under Washington law). Federal courts have also routinely admitted representative testimony to prove back wages owed to employees in FLSA actions, including FLSA actions prosecuted by the Secretary of Labor, not employees. *See United States v. Cole Enters.*, 62 F.3d 775, 781 (6th Cir. 1995) (testimony from "fairly representative employees" may form basis for damages award to larger group of employees); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1298 (3d Cir. 1991) ("It is not necessary for every single affected employee to testify in order to prove violations or to recoup back wages."); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (approving award of back wages to nearly two dozen non-testifying employees based on the representative testimony of five employees); *Donovan v. Bel-Loc Diner,*

Inc., 780 F.2d 1113, 1116 (4th Cir. 1985) ("Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of employees."); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 469, 472-73 (11th Cir. 1982) (finding liability and awarding damages to 207 workers based on representative testimony of 23 witnesses); *see also Tyson foods, Inc. v. Bouaphakeo*, 577 U.S. ___, 136 S. Ct. 1036, 1046, 194 L.Ed.2d 124 (2016) ("A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action."). Indeed, the Ninth Circuit has held that representative testimony presented by the Secretary of Labor is "sufficient to impose upon the district court a duty to estimate back wages." *Brock v. Seto*, 790 F.2d 1446, 1449 (9th Cir. 1986).

There is no principled reason for distinguishing between the types of evidence used in claims under CR 23 and claims brought by a union seeking associational standing to recover damages for lost wages. As in the class action context, the use of representative testimony here was the most efficient way to establish liability and damages. The dominant

and overriding issue was whether Yakima Regional required nurses to report fewer hours than they worked. According to the trier of fact, the evidence at trial was "overwhelming" that this was the case. Representative testimony from the nurse-employees was used to fill in the facts missing from the employer records.

In other words, the trial court allowed the union to use representative employee testimony to establish the employer's widespread wage violations in the same way such evidence has been used in class actions for decades. In both cases, the use of representative evidence promotes administrative convenience and efficiency.

2. The use of representative evidence has allowed workers to obtain relief even when employers fail to keep legally required records that would have otherwise established widespreademployment violations.

The trier of fact determined that "Yakima Regional deliberately kept inaccurate records so as to make it appear the nurses worked fewer hours than they actually did." CP 2888-89. Yakima Regional attempts to use these violations to its advantage by asserting that in the absence of such records, the only way the union can prove its members worked time for which they were not paid is by asking each member. But Yakima Regional's lack of records is not a defense to wage claims.

As the U.S. Supreme Court held more 70 years ago with respect to analogous federal laws, when an employer has not complied with its legally mandated record-keeping requirements, "the solution…is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work." *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). If the employer's records are insufficient, the employee need only demonstrate the amount and extent of work performed "as a matter of just and reasonable inference." *Id*. "The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id*. at 687-88. "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id*.

The Supreme Court emphasized that "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with [the law]." *Id*. at 688; *see also Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1297-98 (3d Cir. 1991) ("The burden of any consequent imprecision

from the absence of an employer's records must be borne by that employer."); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (because employer failed to maintain records, employee testimony was sufficient to prove damages despite being "inconsistent in terms of exact days and hours of overtime worked").

This Court should announce a standard that allows an association to maintain its standing when it seeks monetary damages on behalf of employee members and uses representative employee testimony for the efficient prosecution of its claims. Such a standard will also facilitate the ability of employees to obtain relief for small claims economically and without burdening the courts with an increased number of lawsuits arising out of identical facts. *See Firefighters*, 146 Wn.2d at 216.

To hold otherwise would incentivize employers to keep inaccurate records in an effort to defeat associational standing by any employee organization. Such a standard would make it virtually impossible to bring an associational claim against an employer who fails to pay its employees for all hours worked, contrary to the objectives of the associational standing test. In the alternative, if the Court departs from the standards for representational evidence it has adopted in the class action context, the Court should make clear that its ruling is limited to cases brought by

an association and does not apply to claims brought by workers under Civil Rule 23 or the collective action provisions of the Fair Labor Standards Act.

Yakima Regional argues that "[e]mployees have other routes to pursue collective claims that require representational testimony, such as class actions . . . ." Reply Br. at 5. While class actions are generally available to pursue collective claims under CR 23, and while representative evidence is undeniably admissible to prove classwide damages for those claims, the ability to bring class actions or other employee collective actions is considerably diminished by the imposition of pre-dispute arbitration agreements containing class action waivers. *E.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (a party may not be compelled to submit to class arbitration absent an agreement to do so)*; Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018) (holding that class action waivers in arbitration clauses in employment contracts do not conflict with workers' rights to engage in "concerted activity" under the NLRA). The frequent unavailability of other types of collective action reinforces the need to recognize that representative evidence is admissible to prove damages in union associational claims.

In short, the trial court correctly concluded the union had standing and properly used representative testimony to efficiently establish liability and damages.

B. Allowing the use of representative evidence furthers Washington's longstanding policy of protecting workers.

The use of representative evidence to prove claims on behalf of a group of employees is also consistent with the enforcement of Washington's wage laws. The MWA "was enacted to provide 'an effective mechanism for recovery even where wage amounts wrongfully withheld may be small,'" and the statute "encourages private enforcement in the public interest." *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 533, 128 P.3d 128 (2006) (quoting *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998)). The IWA and its regulations are likewise broad in scope and liberally construed so as to realize their remedial objectives. *See Pellino v. Brink's Inc.*, 164 Wn. App. 668, 684-685, 267 P.3d 383 (2011) (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002)). As such, this Court has repeatedly construed Washington's comprehensive scheme of wage and hour laws in a manner providing the greatest protection to workers.[8] In

[8] *See, e.g., Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712-13, 153 P.3d 846 (2007) (construing "hours worked" under MWA to include all hours worked by Washington

fact, "Washington has a 'long and proud history of being a pioneer in the protection of employee rights.'" *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)).

Because the use of representative evidence promotes the ability of workers to enforce Washington's wage laws and to resolve numerous common claims in an efficient manner, this Court should affirm the decision of the trial court.

IV. CONCLUSION

For the reasons set forth above, WELA and WSLC respectfully ask the Court to affirm the trial court. The use of representative employee testimony is consistent with and furthers the purposes of associational standing as well as Washington's long and proud history of protecting workers. The Court should announce a standard that allows an association to maintain its standing when it seeks monetary damages on

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employees, whether within state or not, because this protects employees); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (construing "salary basis" test under MWA in manner favoring employees); *Everett Concrete Prods., Inc.* v. *Dep't of Labor* & *Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988) (broadly construing Prevailing Wage Act because "employees, not the contractor or its assignee, are the beneficiaries of the Act").

behalf of employee members and uses representative employee testimony for the efficient prosecution of its claims.

RESPECTFULLY SUBMITTED AND DATED this 30th day of September, 2019.

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